

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

_____	)	
BLUE HILLS OFFICE PARK LLC,	)	
Plaintiff/Defendant-in-Counterclaim	)	
	)	
v.	)	Civil Action No. 05-CV-10506 (WGY)
	)	
J.P. MORGAN CHASE BANK, as Trustee for	)	
the Registered Holders of Credit Suisse First	)	
Boston Mortgage Securities Corp., Commercial	)	
Mortgage Pass-Through Certificates,	)	
Series 1999-C1	)	
Defendant	)	
	)	
and CSFB 1999 – C1 ROYALL STREET, LLC	)	
Defendant/Plaintiff-in-Counterclaim	)	
	)	
and	)	
	)	
WILLIAM LANGELIER and	)	
GERALD FINEBERG	)	
Defendants-in-Counterclaim	)	
_____	)	

**OPPOSITION OF BLUE HILLS OFFICE PARK LLC, GERALD FINEBERG AND  
WILLIAM LANGELIER TO MOTION TO STRIKE ALTERATIONS TO DEPOSITION  
TESTIMONY OF GERALD FINEBERG**

**I. INTRODUCTION**

Blue Hills Office Park LLC (“Blue Hills”), Gerald Fineberg (“Fineberg”) and William Langelier (“Langelier”) hereby oppose the Defendants and Plaintiffs-in-Counterclaim’s Motion to Strike Alterations to Deposition Testimony of Gerald Fineberg (“Motion to Strike”). In short, the Defendants, J.P. Morgan Chase Bank, as Trustee for the Registered Holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 1999-C1 (“J.P. Morgan”) and CSFB 1999 – C1 Royall Street, LLC (“CSFB”) (collectively, “Defendants”), have misstated the relevant legal standard governing deposition

errata sheets and have mischaracterized or have quoted portions of Gerald Fineberg's ("Fineberg") deposition testimony out of context. Moreover, the changes contained in Fineberg's errata sheet – intended to clarify his original deposition testimony - are consistent with Fineberg's testimony in other portions of his deposition transcript, in his answers to interrogatories, in documents produced during discovery, and in the deposition of testimony of other witnesses, including Kenneth Goldberg ("Goldberg"). Accordingly, the Motion to Strike must be denied.

## **II. FACTUAL BACKGROUND**

The Defendants, as assignees of Credit Suisse First Boston Mortgage Capital, LLC ("Credit Suisse"), loaned approximately \$33.1 million to Blue Hills (the "Loan") secured by a mortgage on Blue Hills' property located at 150 Royall Street, Canton, Massachusetts (the "Property"). The Loan closed on or about September 14, 1999. The formation of Blue Hills as a single purpose entity was required as a precondition to this 1999 refinancing. Blue Hills' sole member is Royall Associates Realty Trust ("Royall Trust"), which was the owner of the Property prior to the 1999 re-financing. Fineberg and Langelier are two of Royall Trust's trustees of the Royall Trust, as well as also being two of its six beneficiaries.

Blue Hills commenced the instant action seeking damages for multiple breaches of certain loan documents committed by Defendants and their disclosed agents. Such breaches include the Defendants wrongful declaration that Blue Hills defaulted on the Loan and the refusal to release to Blue Hills funds held in certain reserve accounts that would have enabled Blue Hills to meet its Loan obligations. These wrongful acts culminated in a foreclosure sale of the Property on November 19, 2004.

The Counterclaims asserted against Blue Hills, Fineberg and Langelier allege Loan-related breaches relating to Blue Hills' 2003 filing of an action in Norfolk Superior Court (the "Norfolk Action") appealing a zoning decision in connection with the abutting property located at 250 Royall Street, Canton, Massachusetts ("250 Royall"), the settlement of the Norfolk Action, and the receipt of \$2,000,000 in settlement proceeds ("Settlement Proceeds") in exchange for the dismissal of the Norfolk Action. Defendants allege, *inter alia*, that the Loan documents required Blue Hills to obtain Defendants' prior written consent to the settlement of the Norfolk Action and that the Settlement Proceeds were transferred from Blue Hills in violation of the non-recourse provisions of the Loan.

Blue Hills, Fineberg and Langelier have consistently maintained, that no transfer of the Settlement Proceeds occurred. Although challenged by Defendants, it is undisputed that the Settlement Proceeds were deposited into Blue Hills' clients fund account at the offices of Bernkopf Goodman LLP on or about August 8, 2003. Bernkopf Goodman's accounting records identify the specific account into which the Settlement Proceeds were wired as "Fineberg Royall Associates." This account identifier was created at a time when the Royall Trust was the Property's fee owner and was not changed when Blue Hills was formed as a special purpose entity as required by Credit Suisse. The Settlement Proceeds remained in the Blue Hills' clients fund account at Bernkopf Goodman LLP until early 2005, when one-half of the proceeds – \$1 million – were transferred to a clients fund account at Wilmer, Cutler, Pickering Hale and Dorr, LLP ("Wilmer Cutler"), a firm representing Langelier. In addition to the Settlement Proceeds, approximately \$3.7 million - consisting of Property-related distributions were retained by Blue Hills as a "rainy day" reserve fund.

Ignoring the documents produced by Blue Hills, Fineberg, and Langelier, Fineberg's answers to interrogatories, and Goldberg's deposition testimony, the Defendants have, instead, chosen to distort Fineberg's deposition testimony to support their claim that the Settlement Proceeds were transferred from Blue Hills to the Royall Trust. Fineberg was deposed on April 5, 2006 and provided his errata sheet to Defendants on June 7, 2006, the deadline agreed to by the parties. A copy of Fineberg's errata sheet together with those pages of the deposition clarified by the errata sheet are attached hereto as Exhibit "A." In the errata sheet, Fineberg made only five changes to the 255 pages of his deposition testimony. Fineberg did not change or contradict his original answers; rather, Fineberg added language to clarify five of his answers. As discussed below, the changes made by Fineberg are permitted by Fed. R. Civ. P. 30(e) and Defendants' Motion to Strike must be denied.

### **III. ARGUMENT**

#### **A. The Changes to Fineberg's Deposition Are Permitted Under Fed. R. Civ. 30(e)**

Fed. Rule Civ. P. 30(e) states, in pertinent part, that the "deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording, and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them . . . ." The "express language of Rule 30(e) allows a deponent to change the substance of his answers." *Tingley Systems, Inc. v. CSC Consulting, Inc.*, 152 F.Supp. 2d 95 (2001), *citing Rios v. Bigler*, 847 F. Supp. 1538, 1546 (D. Kan. 1994).

"Rule 30(e) allows deponents to provide revised answers to deposition questions, including answers contradictory to those provided at the deposition. The Rule does not require a judge to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes -

even if those reasons are unconvincing . . . .” *Elwell v. Conair, Inc.*, 145 F. Supp. 79, 86 (D. Me. 2001), citing *Great N. Storehouse, Inc. v. Peerless Ins. Co.*, 2000 WL 1901266 (D. Me. 2000) (stated reason for change to deposition testimony was “more complete answers”). Fineberg’s reason for making the five changes to his deposition transcript was to clarify his original answers. Even if Fineberg’s changes contradicted his original testimony – which they do not – such changes are permitted by Fed. R. Civ. P. 30(e). Each clarification to Fineberg’s testimony is discussed *infra*.

Defendants appear to rely upon the *Tingley* case for the proposition that Fineberg has not provided sufficient reasoning for the changes described his errata sheet. *Tingley* is distinguishable as the party in *Tingley* sought to *re-open* certain depositions rather than to strike the errata sheets. “The standard to reopen a deposition is whether the changes contained in the errata sheets “make the deposition incomplete or useless without further testimony.” *Tingley*, 152 F. Supp. at 120. In *Tingley*, the deponents made 117 changes to the deposition transcripts, 22 of which were described in the motion before the court as “express examples of the 117 corrections.” *Id.* at 119. In applying the standard applicable to reopen depositions, the court stated that “the number and type of changes made to the depositions justify a reopening for the limited purpose of inquiring into the reasons for the changed answers. . . .” *Tingley* is also distinguishable from the present case in that Fineberg makes only five changes to his transcript clarification as approved, to substantiate changes - and Defendants have not requested the opportunity to reopen his deposition.

Moreover, even if the Defendants moved to re-open Fineberg’s deposition, the standards governing a motion to reopen Fineberg’s deposition cannot be met by the Defendants. Fineberg did not change his deposition testimony in such a manner as to make the testimony “incomplete

or useless without further testimony,” as the changes are *consistent* with Fineberg’s testimony in other parts of the deposition transcript, his answers to interrogatories, documents produced by him, and testimony provided by Goldberg.

In addition, Defendants are not prejudiced by Fineberg’s errata sheet. “If the original answer as well as the changes are made available to the jury when and if the deposition testimony is used at trial, the jurors should be able to discern the artful nature of the changes. For purposes of pre-trial motions, the plain language of Rule 30(e) should control. The motion to strike or suppress the errata sheet is denied.” *Elwell*, 145 F. Supp. at 86-87; *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98 (2<sup>nd</sup> Cir. 1997). When and if Fineberg’s deposition testimony is used at the trial of this matter, the Defendants will have the opportunity to introduce both the original testimony and the errata sheet.

**B. The Defendants Have Taken Fineberg’s Testimony Out of Context**

To support their contention that the Settlement Proceeds were transferred by Blue Hills in violation of Section 10 of the Mortgage Agreement, the Defendants latch onto a handful of questions and answers exchanged during Fineberg’s deposition during which, they argue, Fineberg admitted that a transfer occurred. The Defendant’s contentions are as disingenuous as they are incorrect. In each of the questions at issue, Defendants’ counsel variously referred to the entity to which Defendants now claim the Settlement Proceeds were transferred to as the “Royall Associates Realty Trust”, “Royall Associates Trust”, “Royall Associates” and the “trust.” Standing alone, this lack of precision in the Defendant’s counsel’s questioning warranted the clarifications made by Fineberg in his errata sheet. In addition, there were distributions of the “rainy day” reserve (not including the Settlement Proceeds) made to Fineberg and Langelier after the November, 2004 Property foreclosure sale that the Defendants do not

challenge, yet the Defendant's counsel's lack of precision in his questioning blurred the distinction between the reserve funds which were distributed without objection and the Settlement Proceeds which were not distributed..

For example, the line of questioning on page 177 of the Fineberg's deposition transcript focuses on Blue Hills' desire to meet with the Defendant and the fact that Blue Hills had approximately \$6 million in reserve funds which included the Settlement Proceeds:<sup>1</sup>

Q. When you didn't get a meeting right away, why didn't you furnish the stuff you agreed to furnish, including the business plan?

A. They had most of the stuff.

Q. They didn't have a business plan as to what your plan was for the property, did they?

A. They knew -- they had been in business. They knew what you do with an empty building. You keep paying them until you find a tenant. That was the business plan, just go out and work our little tails off until we found a tenant. And then I told you where the 6 million plus was coming from.

Q. You never told Lennar where the 6 million plus was coming from --

A. I didn't, but --

Q. You have to wait for me to finish the question. You never told Lennar that you had 6 million in reserve accounts held by Royall Associates Realty Trust ready to devote to the building, did you?

A. I would have had I had a meeting. **However, the money in the reserve accounts was always held by my attorneys for Blue Hills Office Park LLC.**

Q. But in advance of the meeting, you never put that in a business plan of the sort that you agreed to provide in the prenegotiation letter, did you?

A. Yes, that's correct.

Q. Similarly, you didn't provide Lennar with the financial statements of the guarantors, yourself, to show your financial resources and ability to contribute money to the property, did you?

A. I was waiting for the meeting to show them.

Q. Notwithstanding you agreed to provide it in the prenegotiation letter, you never did provide it after signing that letter, did you?

(emphasis added)

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<sup>1</sup> The clarifications contained in Fineberg's errata sheet are set out in bold face type.

Similarly, on pages 180-181 of Fineberg's deposition, the Defendant's counsel's line of questioning is unrelated to the Settlement Proceeds; rather, it focuses on Blue Hills' desire to use all of the reserve funds – which Fineberg considered to be “all in one” - until a new tenant could be located:

- Q. And you said a minute ago you would use the reserve money to pay principal and interest. Were you referring then to the money that Royall Associates Realty Trust had in reserve?
- A. To be honest with you, I was counting the reserves all in one. It didn't matter which. Reserves are reserves. I didn't have it to spend -- I mean, it was in reserve, it wasn't fresh money coming in.
- Q. Your plan for how to save the building was to use the money both in the reserves held by the bank, which was about \$4 million, plus the approximately \$6 million that was held by Royall Associates Trust of which Lennar had no knowledge, to find a new tenant, and tide the property over until that tenant could start paying the rent?
- A. That's correct, **but the approximately \$6 million was held by Blue Hills Office Park LLC.**
- Q. And once you had a tenant in there and had a guaranteed income stream, then your idea would be to refinance the property?
- A. That's correct.
- Q. And at that point if you could obtain some partial forgiveness of the debt, you would?
- A. That's hoping way in the future. I didn't get that far yet.

(emphasis added)

Again, on pages 194-195 of Fineberg's deposition, the Defendant's counsel's line of questioning focuses on Blue Hill's plans for the Property had Defendants met with Blue Hills and certain reserve funds:

- Q. They're renovating the whole thing. You can see right through it today; are you aware of that?
- A. No. That doesn't mean they're right.
- Q. They are having to put into the building about as much as they paid for it; are you aware of that?
- A. So then it's worth 44 million.
- Q. Did the plan that you had in mind for the building require -- let me back up. Your plan for the building involved using money in the reserves and also using the 5 plus million dollars you had in an account being held by the attorneys for Royall Associates, right?



A. Yes, **except that the money held by my attorneys was held for Blue Hills Office Park LLC.**

Q. And the plan also involved some period of time where you would fix up the building and thereby be able to attract a tenant, get them in there, and fix up the building for them, right?

A. Yes.

Q. You anticipated, didn't you, that in order to do all that you were going to have to modify the loan document?

A. Yes.

(emphasis added)

Finally, on pages 242-243 of Fineberg's deposition, the line of questioning focuses on all of the funds in the reserve account, not just the Settlement Proceeds:

Q. As of August '03, did Blue Hills own -- strike that. As of August 2003, did Blue Hills Office Park LLC own anything other than Blue Hills Office Park?

A. Not that I know of.

Q. Did it have any bank accounts other than the operating account that was controlled by Fineberg Management?

A. I don't know.

Q. We've talked today about monies that built up in reserve accounts, as you called them, for Royall Associates Realty Trust, right?

A. Yes.

Q. And that was money distributed from Blue Hills Office Park LLC to the trust, correct?

A. Yes, yes. **Only some of the money in the reserve accounts was distributed. The \$2 million received from DST has never been distributed and is still being held by my attorneys and Bill Langelier's attorney for Blue Hills Office Park LLC.**

Q. Did Blue Hills ever retain money that was available for distribution to the members?

MR. MCGLYNN: Objection as to form.

A. I don't know.

(emphasis added)

In addition, the consistency of Fineberg's answers is evident in deposition testimony not referenced by Defendants in the Motion to Strike. For example, on page 92 of Fineberg's

deposition transcript, Fineberg testified that the Settlement Proceeds were retained by Blue Hills' attorneys in special accounts.

Q: Why did you keep the 2-million-dollar settlement payment in the entity, in Blue Hills Office Park LLC, as a reserve against the day that you knew was coming a year later when Equiserve was going to move out?"

MR. MCGLYNN: Objection.

A: "I sent it to the -- I never saw the money. It went directly with the attorneys, and I kept it in the special accounts.

(emphasis added)

Here, Defendants' counsel's question refers to the Settlement Proceeds held by Blue Hills, not the Royall Trust. Fineberg's answer is consistent both with Fineberg's errata sheet as well as interrogatory answers, documents produced and Goldberg's testimony, discussed *infra*.<sup>2</sup>

Fineberg's testimony appearing on pages 62-63 and 66 of his deposition transcript is also consistent with Fineberg's errata sheet, his interrogatory answers, the documents Blue Hills produced and in Goldberg's testimony that the Settlement Proceeds were held by Blue Hills attorneys:

Q: Mr. Fineberg, the first page of Exhibit 177 looks like a ledger sheet from an account. Across the top it says "Fineberg Royall Associates." Then it says "Century Bank." My question to you is, do you know where the 2-million-dollar settlement payment went when it was paid by DST to Blue Hills Office Park?

A. No, I don't.

Q. We've been told it went into a client fund account. Do you know that?

A. Yes, that I know.

Q. For whose benefit was that money held, which client, Royall Associates Realty Trust?

A. I don't know. To the -- I don't know, but it went into the lawyers' account.

Q. Who presently has control of those accounts?

A. Mr. Goldberg and Mr. Cohn.

Q. And who are they answering to, which client, you?

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<sup>2</sup> See Exhibit "B" attached hereto.

A. Both, I think. I can't answer that.

Q. Well do you understand that you, Jerry Fineberg, have the ability to tell Ken Goldberg what to do with that 2 million?

A. I don't think so.

Q. Who do you think does have the ability to tell Mr. Goldberg what to do with the money?

A. Both of us.

Q. You and Mr. Langelier?

A. I think so.

Q. As the beneficiaries of the Royall Associates Realty Trust?

A. I can't answer that. That's getting into legal.

Fineberg Deposition, p. 66.<sup>3</sup>

**C. The Sham Affidavit Rule is Inapplicable**

The so-called “sham affidavit” rule has been held to apply to situations where a party contradicts deposition testimony by an affidavit solely in an attempt to avoid summary judgment. *See, e.g. Mahan v. Boston Water and Sewer Com’n*, 179 F.R.D. 49 (D. Mass. 1998). The court in *Mahan*, however, declined to extend the sham affidavit doctrine to a nonparty's affidavit that contradicts a party's deposition testimony. In addition, the court stated, “This Court agrees that ‘a district court must consider all the evidence before it and cannot disregard a party's affidavit merely because it conflicts to some degree with an earlier deposition . . . .’” *Id.*, citing *Kennett-Murray Corp. v. Bone*, 622 F.2d 887 (5<sup>th</sup> Cir. 1980) (affidavit explained aspects of deposition testimony and alleged inconsistency created by affidavit existed within deposition itself).

Defendants’ argument that Blue Hills, Fineberg and Langelier have violated the sham affidavit rule by changing Fineberg’s deposition testimony to “manufacture” the fact that a transfer of the Settlement Proceeds did not occur in an effort to defeat summary judgment is

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<sup>3</sup> *Id.*

factually and legally erroneous. In their opposition memoranda to the Defendant's motions for summary judgment, Blue Hills, Fineberg and Langelier rely on several different sources of undisputed evidence that no transfer of the Settlement Proceeds occurred and that the Settlement Proceeds have been held by counsel on behalf of Blue Hills since August 2003. The changes contained in Fineberg's errata do not "manufacture" these facts, they simply classify Fineberg's answers.

Furthermore, as briefed in Blue Hills, Fineberg and Langelier's summary judgment reply memoranda, Blue Hills produced documents showing that the Settlement Proceeds were wired into Bernkopf Goodman's clients fund account at Century Bank on August 8, 2003 which has identified the name "Fineberg Royall Associates" on the account ledger card.<sup>4</sup> Records were also produced by Blue Hills showing that one-half of the Settlement Proceeds were wired to Wilmer Cutler, counsel for Langelier, on February 1, 2005. Finally, the internal records of Century Bank, Danversbank and Wilmer Cutler also produced which corroborate the banking transactions revealed by Bernkopf Goodman and Wilmer Cutler's clients fund account records. None of this documentary evidence is rebutted by the Defendants.

In addition, in his answer to Defendants' Interrogatory No. 11<sup>5</sup>, Fineberg also stated that the Settlement Proceeds were wired to a clients fund account at Bernkopf Goodman LLP in August 2003 and have not been distributed.

The Defendant's assertion that Blue Hills, Fineberg and Langelier are creating issues of fact to defeat summary judgment is also specious given Goldberg's deposition testimony. As stated in the Blue Hills Reply, Goldberg was a co-escrow agent (along with Wilmer Cutler's

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<sup>4</sup> See Exhibit "C" attached hereto.

<sup>5</sup> See Exhibit "D" attached hereto.

Andrew Cohn (“Cohn”)) of the Settlement Proceeds. While Goldberg’s testimony is set out in detail in the Reply, it is summarized below for ease of reference:

- During his deposition, in answer to the question, “For what client were those funds held?”, Goldberg answered, “In this case they were held for Blue Hills Office Park for the \$2 million that we are talking about . . .” Goldberg Deposition, page 65, lines 4-8.
- In answer to the question, “So although is says Royall , the money was actually received by Blue Hills Office Park LLC?”, Goldberg answered, “Yes. That’s set out in writing in Exhibit 21. It is very clear.” Goldberg Deposition, page 73, lines 18 - 22.
- Further, in answer to the question, “But you do know, you say, that the \$2 million settlement payment had not been distributed by the LLC to the realty trust?”, Goldberg answered “I do know that and did say that because it had been in counsel’s custody from inception and had not changed.” Goldberg Deposition, page 157, lines 20 - 22.
- In answer to the question, “And who were the client or clients for whom those accounts were held?”, Goldberg answered “I only can answer here that the \$2 million, because I had custody of that from inception.” Goldberg Deposition, page 164, lines 12 - 20. Goldberg further testified, “The answer is clear. If I go back to where it came from, it is very clear here. Pursuant to your Exhibit 21 settlement agreement, it was your LLC’s money, the payment was made to the LLC, payment to BHOP. It is clear. That money got wired in, and it was never changed, into the same account; it’s been in the same account from 8/8/03, when it was received . . . there was no distribution or other change of ownership.” Goldberg Deposition, page 165, lines 2 - 13.
- Goldberg also testified that “The \$2 million came pursuant to an agreement for the benefit of Blue Hills Office Park into in fact an account, defined account, separate account into our clients funds account and has continued to stay there.” Goldberg Deposition, page 169, lines 5 - 9.

Copies of these referenced pages of Goldberg’s deposition transcript referenced above are attached hereto as Exhibit “E.” As Goldberg’s deposition testimony, Fineberg’s own testimony, and Fineberg’s responses to written discovery consistently demonstrate that no transfer of Settlement Proceeds occurred, Fineberg’s errata sheet cannot be declared a “sham” to defeat summary judgment for purposes of the “sham affidavit rule.” *See Mahan*, 179 F.R.D. 49.

#### IV. CONCLUSION

The changes to Fineberg's deposition testimony are permissible under Fed. R. Civ. P. 30(e), do not violate the so-called "sham affidavit rule" and are necessary to clarify Fineberg's intent in answering the questions posed. These changes are consistent with Fineberg's answer to Defendants' Interrogatory No. 11, the documents produced by Fineberg in discovery, the testimony of Goldberg and with Fineberg's own deposition testimony in the portions of the transcript not cited by Defendants. Moreover, in the event that Fineberg's testimony is introduced at the trial of this matter, Defendants will have the opportunity to introduce both the original testimony and the errata sheet. Accordingly, the Motion to Strike should be denied.

WHEREFORE, Blue Hills, Fineberg and Langelier respectfully request that this Court enter an order:

1. Denying the Motion to Strike; and
2. Providing such other and further relief as is necessary and just.

Respectfully submitted,

BLUE HILLS OFFICE PARK LLC, WILLIAM  
LANGELIER AND GERALD FINEBERG,  
By their attorneys,

/s/ Peter B. McGlynn

Peter B. McGlynn, Esquire (BBO No. 333660)  
Meredith A. Swisher, Esquire (BBO No. 646866)  
BERNKOPF GOODMAN LLP  
125 Summer Street, Suite 1300  
Boston, Massachusetts 02110  
Telephone: (617) 790-3000  
Facsimile: (617) 790-3300  
pmcglynn@bg-llp.com  
mswisher@bg-llp.com

Dated: July 7, 2006  
#341024 v3/14500/9985

# EXHIBIT A

WITNESS: Gerald S. Fineberg

CASE: Blue Hills Office Park LLC v. J.P. Morgan Chase Bank, et al., etc.

SIGNATURE PAGE/ERRATA SHEET

PAGE	LINE	CHANGE OR CORRECTION AND REASON
177	10	should read, "I would have had I had a meeting. However, the money in the reserve accounts was always held by my attorneys for Blue Hills Office Park LLC." Reason: clarification
181	4	should read "That's correct, but the approximately \$6 million was held by Blue Hills Office Park LLC." Reason: clarification
194	4	should read "Yes, except that the money in the account held by my attorneys was held for Blue Hills Office Park LLC." Reason: clarification
243	9	should read "Yes, although the money in the reserve account was held for Blue Hills Office Park LLC." Reason: clarification
243	12	should read "Only some of the money in the reserve accounts was distributed. The \$2 million dollars received from DST has never been distributed and is still being held by my attorneys and Bill Langelier's attorney for Blue Hills Office Park LLC." Reason: clarification

I have read the transcript of my deposition taken 4/5/06. Except for any corrections or changes noted above I hereby subscribe to the transcript as an accurate record of the statements made by me.

Signed under the pains and penalties of perjury.

Gerald S. Fineberg DATE 6-6-06  
Deponent, Gerald S. Fineberg



30(b)(6) Deposition by Gerald S. Fineberg  
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1 this information with them, and I would have  
2 supplied it and I would have supplied a business  
3 plan, but you have to sit down with Lennar in order  
4 to make a business plan.

5 Q. So -- strike that. Although you had agreed  
6 to provide a business plan, your plan for the  
7 property, in this letter, you weren't going to  
8 provide it until after you had a chance to sit down  
9 with them and look them in the eye?

10 A. Well, I wanted the meeting right away.  
11 This would have taken time. A lot of these things  
12 would take time to get current. I wanted to have a  
13 meeting and get going with it.

14 Q. When you didn't get a meeting right away,  
15 why didn't you furnish the stuff you agreed to  
16 furnish, including the business plan?

17 A. They had most of the stuff.

18 Q. They didn't have a business plan as to what  
19 your plan was for the property, did they?

20 A. They knew -- they had been in business.  
21 They knew what you do with an empty building. You  
22 keep paying them until you find a tenant. That was  
23 the business plan, just go out and work our little  
24 tails off until we found a tenant. And then I told

30(b) (6) Deposition by Gerald S. Fineberg  
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1 you where the 6 million plus was coming from.

2 Q. You never told Lennar where the 6 million  
3 plus was coming from --

4 A. I didn't, but --

5 Q. You have to wait for me to finish the  
6 question. You never told Lennar that you had 6  
7 million in reserve accounts held by Royall  
8 Associates Realty Trust ready to devote to the  
9 building, did you?

10 A. I would have had I had a meeting.

11 Q. But in advance of the meeting, you never  
12 put that in a business plan of the sort that you  
13 agreed to provide in the prenegotiation letter, did  
14 you?

15 A. Yes, that's correct.

16 Q. Similarly, you didn't provide Lennar with  
17 the financial statements of the guarantors,  
18 yourself, to show your financial resources and  
19 ability to contribute money to the property, did  
20 you?

21 A. I was waiting for the meeting to show them.

22 Q. Notwithstanding you agreed to provide it in  
23 the prenegotiation letter, you never did provide it  
24 after signing that letter, did you?

30(b)(6) Deposition by Gerald S. Fineberg  
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1 to spend the money to get a tenant. What money are  
2 you referring to?

3 A. Spend the money that we had in reserves  
4 first.

5 Q. And you're referring to which reserves, the  
6 reserves held by the bank or the reserves held by  
7 Royall Associates Realty Trust that Lennar didn't  
8 know about?

9 A. To spend the money that the bank had first  
10 and then the money that we had in reserve at the  
11 attorneys' office.

12 Q. And you said a minute ago you would use the  
13 reserve money to pay principal and interest. Were  
14 you referring then to the money that Royall  
15 Associates Realty Trust had in reserve?

16 A. To be honest with you, I was counting the  
17 reserves all in one. It didn't matter which.  
18 Reserves are reserves. I didn't have it to spend --  
19 I mean, it was in reserve, it wasn't fresh money  
20 coming in.

21 Q. Your plan for how to save the building was  
22 to use the money both in the reserves held by the  
23 bank, which was about \$4 million, plus the  
24 approximately \$6 million that was held by Royall

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1 Associates Trust of which Lennar had no knowledge,  
2 to find a new tenant, and tide the property over  
3 until that tenant could start paying the rent?

4 A. That's correct.

5 Q. And once you had a tenant in there and had  
6 a guaranteed income stream, then your idea would be  
7 to refinance the property?

8 A. That's correct.

9 Q. And at that point if you could obtain some  
10 partial forgiveness of the debt, you would?

11 A. That's hoping way in the future. I didn't  
12 get that far yet.

13 Q. But in any event, your anticipation was  
14 that you would refinance on whatever terms you could  
15 get?

16 A. That's correct.

17 Q. But you didn't want to tell Lennar this?

18 MR. MCGLYNN: Objection.

19 A. I couldn't tell Lennar this. They didn't  
20 sit down with us. If a person is not willing to sit  
21 down with you, then they're not willing to talk to  
22 you. What good is it sending smoke screens up to  
23 them and signals? I wanted to sit down. It was  
24 their obligation to sit down with me.

30(b)(6) Deposition by Gerald S. Fineberg  
Volume 1 - April 5, 2006

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1 spend?

2 A. A million or two.

3 Q. But no more?

4 A. No, not until we got a tenant.

5 Q. You know what the owner who bought it for  
6 23 million is doing to it, don't you?

7 A. No, I don't.

8 Q. You haven't driven by and seen it?

9 A. I haven't driven by it.

10 Q. They're renovating the whole thing. You  
11 can see right through it today; are you aware of  
12 that?

13 A. No. That doesn't mean they're right.

14 Q. They are having to put into the building  
15 about as much as they paid for it; are you aware of  
16 that?

17 A. So then it's worth 44 million.

18 Q. Did the plan that you had in mind for the  
19 building require -- let me back up. Your plan for  
20 the building involved using money in the reserves  
21 and also using the 5 plus million dollars you had in  
22 an account being held by the attorneys for Royall  
23 Associates, right?

24 A. Yes.

30(b) (6) Deposition by Gerald S. Fineberg  
Volume 1 - April 5, 2006

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1 Q. And the plan also involved some period of  
2 time where you would fix up the building and thereby  
3 be able to attract a tenant, get them in there, and  
4 fix up the building for them, right?

5 A. Yes.

6 Q. You anticipated, didn't you, that in order  
7 to do all that you were going to have to modify the  
8 loan document?

9 A. Yes.

10 Q. Did you think as of November 2004 that  
11 Lennar had no legal right to foreclose on the  
12 property?

13 A. Say that once more.

14 Q. Sure. As of November 2004, did you think  
15 that Lennar had no legal right to foreclose on the  
16 property?

17 A. Yes.

18 MR. MCGLYNN: Objection.

19 Q. So why didn't you sue to enjoin the  
20 foreclosure?

21 A. I was waiting for a meeting with our  
22 attorneys to sit down and to discuss it.

23 Q. They wouldn't give you a meeting either?

24 A. Oh (gesturing).

30(b) (6) Deposition by Gerald S. Fineberg  
Volume 1 - April 5, 2006

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1 it. I don't remember discussing it or remember it.

2 Q. You told me before that sometimes you  
3 looked at your cc's and sometimes you didn't. Do  
4 you know if you looked at this one?

5 A. This looks familiar, but I can't remember.

6 Q. Do you know anything about the last 10,000  
7 of rent that EquiServe paid that Blue Hills didn't  
8 turn over to the lender?

9 A. No.

10 MR. MCGLYNN: Objection to the form.

11 A. What? I didn't hear you.

12 Q. Do you know anything about the last 10,000  
13 of rent paid by EquiServe?

14 A. No.

15 Q. Do you know whether it was turned over to  
16 the lender or not?

17 A. I don't know.

18 Q. Do you know whether it was deposited to the  
19 lockbox account?

20 A. I don't know.

21 Q. As of August '03, did Blue Hills own --  
22 strike that. As of August 2003, did Blue Hills  
23 Office Park LLC own anything other than Blue Hills  
24 Office Park?

30(b) (6) Deposition by Gerald S. Fineberg  
Volume 1 - April 5, 2006

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1 A. Not that I know of.

2 Q. Did it have any bank accounts other than  
3 the operating account that was controlled by  
4 Fineberg Management?

5 A. I don't know.

6 Q. We've talked today about monies that built  
7 up in reserve accounts, as you called them, for  
8 Royall Associates Realty Trust, right?

9 A. Yes.

10 Q. And that was money distributed from Blue  
11 Hills Office Park LLC to the trust, correct?

12 A. Yes, yes.

13 Q. Did Blue Hills ever retain money that was  
14 available for distribution to the members?

15 MR. MCGLYNN: Objection as to form.

16 A. I don't know.

17 Q. Well, you and Bill Langelier made decisions  
18 about distributing money, right?

19 A. Right.

20 Q. And Mr. Langelier at least was interested  
21 in maximizing the benefits from his ownership of the  
22 property. Were you similarly interested in  
23 maximizing the benefits?

24 A. Yes.



# EXHIBIT B

30(b)(6) Deposition by Gerald S. Fineberg  
Volume 1 - April 5, 2006

Volume 1, Pages 1-256

Exhibits: 322-332, 334-339

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS  
Civil Action No. 05-CV-10506 (WJY)

-----  
BLUE HILLS OFFICE PARK LLC

Plaintiff, Defendant-in-Counterclaim

vs.

J.P. MORGAN CHASE BANK, et al.

Defendant

(Complete caption on next page.)  
-----

30(b)(6) DEPOSITION OF BLUE HILLS OFFICE PARK LLC

By GERALD S. FINEBERG

Wednesday, April 5, 2006, 9:39 a.m.

DLA Piper Rudnick Gray Cary US LLP

33 Arch Street, 21st Floor

Boston, Massachusetts

----- Reporter: Joan M. Cassidy, RPR, CRR -----

Farmer Arsenault Brock LLC

50 Congress Street, Suite 415

Boston, Massachusetts 02109

617.728.4404 fax 617.728.4403

FARMER ARSENAULT BROCK LLC

30(b)(6) Deposition by Gerald S. Fineberg  
Volume 1 - April 5, 2006

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1 A. I don't know. I'd have to check on that.

2 Q. Do you recall that there was a lease  
3 termination agreement as part of the settlement?

4 A. I think there was.

5 Q. And you understood, didn't you, that the  
6 settlement which included this lease termination  
7 agreement eliminated any possibility that EquiServe  
8 would stay in your building?

9 MR. MCGLYNN: Objection.

10 A. Yes.

11 Q. Why did you keep the 2-million-dollar  
12 settlement payment in the entity, in Blue Hills  
13 Office Park LLC, as a reserve against the day that  
14 you knew was coming a year later when EquiServe was  
15 going to move out?

16 MR. MCGLYNN: Objection.

17 A. I sent it to the -- I never saw the money.  
18 It went directly with the attorneys, and I kept it  
19 in the special accounts.

20 Q. Did you yourself consider that you should  
21 keep the 2-million-dollar settlement payment in the  
22 hands of the entity Blue Hills Office Park LLC as a  
23 reserve against the day you now knew was coming for  
24 sure a year later when EquiServe would move out and

30(b)(6) Deposition by Gerald S. Fineberg  
Volume 1 - April 5, 2006

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1 which we've been told relate to the settlement  
2 payment of \$2 million.

3 A. (Witness reviews document.)

4 MR. MCGLYNN: You know what, Bruce?  
5 None of us thought about it, but obviously this is  
6 subject to the confidentiality stipulation. So we  
7 should probably mark this portion of the transcript  
8 dealing with all of this, and prior to this,  
9 Mr. Fineberg's testimony concerning the  
10 2-million-dollar settlement.

11 MR. FALBY: Maybe when you get it, you  
12 can designate the pages.

13 MR. MCGLYNN: I'll do that. This is  
14 more of a reminder to me than to you.

15 Q. Mr. Fineberg, the first page of Exhibit 177  
16 looks like a ledger sheet from an account. Across  
17 the top it says "Fineberg Royall Associates." Then  
18 it says "Century Bank." My question to you is, do  
19 you know where the 2-million-dollar settlement  
20 payment went when it was paid by DST to Blue Hills  
21 Office Park LLC?

22 A. No, I don't.

23 Q. We've been told it went into a client fund  
24 account. Do you know that?

30(b) (6) Deposition by Gerald S. Fineberg  
Volume 1 - April 5, 2006

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1 A. Yes, that I know.

2 Q. For whose benefit was that money held,  
3 which client, Royall Associates Realty Trust?

4 A. I don't know. To the -- I don't know, but  
5 it went into the lawyers' account.

6 Q. But you don't know which client account?

7 A. I don't understand.

8 Q. Lawyers hold money in different accounts.  
9 Sometimes they hold it in a client account for the  
10 benefit of a particular client. Do you know for  
11 whose benefit Bernkopf was holding this \$2 million,  
12 whether it was for the benefit of Royall Associates  
13 Realty Trust or your personal benefit? Do you know?

14 A. I don't know.

15 Q. Do you know what happened to that \$2  
16 million once it was wired to the Bernkopf account?

17 A. No, I don't.

18 Q. Do you know that subsequently -- strike  
19 that. Do you know if any of it was ever wired  
20 anywhere thereafter?

21 A. As far as I know, the attorneys, Cohn and  
22 Goldberg, still have it.

23 Q. Do you remember the 4.2 million that the  
24 December agreement said was in the supplemental

30(b) (6) Deposition by Gerald S. Fineberg  
Volume 1 - April 5, 2006

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1 Q. Who presently has control of those  
2 accounts?

3 A. Mr. Goldberg and Mr. Cohn.

4 Q. And who are they answering to, which  
5 client, you?

6 A. Both, I think. I can't answer that.

7 Q. Well, do you understand that you, Jerry  
8 Fineberg, have the ability to tell Ken Goldberg what  
9 to do with that 2 million?

10 A. I don't think so.

11 Q. Who do you think does have the ability to  
12 tell Mr. Goldberg what to do with the money?

13 A. Both of us.

14 Q. You and Mr. Langelier?

15 A. I think so.

16 Q. As the beneficiaries of the Royall  
17 Associates Realty Trust?

18 A. I can't answer that. That's getting into  
19 legal.

20 Q. So whether it's on your own individual  
21 behalf or as beneficiaries of a trust or as trustees  
22 of a trust or whatever, you don't know the capacity,  
23 but you do know that you and Mr. Langelier have the  
24 ability to control the disposition of the settlement

# EXHIBIT C

Century

Ben

**CONFIDENTIAL**

**BALANCE FORWARD →**

[illegible]



NAME  
ADDRESS  
CITY

FINEBERG

CONFIDENTIAL

KMG

150 ROYALL ST.  
BALANCE FORWARD →

DATE	FOLIO	DETAIL	✓	DEBIT	CREDIT	BALANCE	PREVIOUS BALANCE
------	-------	--------	---	-------	--------	---------	------------------

2	2/1/05	WIRE-OUT	Wilmer, Cutler, et al (H&L - D&R)	1,000,000	-		
4	2/2/05	WIRE-OUT	158 - CENTURY Master card	11,000,000	-		
5							
6							
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**Safeguard**  
BUSINESS SYSTEMS, INC.  
FORM NO. ARL-7

ACCOUNTS RECEIVABLE LEDGER  
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IF UNKNOWN, CALL 800-523-2422

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BLUE HILL  
5508

**CONFIDENTIAL**

**CENTURY BANK INTEREST BEARING ACCOUNTS**

**TRANSFERRED 4/1/05 TO DANVERSBANK**

Name	Account Number	Amount
------	----------------	--------

Fineberg - 150 Royall	27908692	1,003,839.25
-----------------------	----------	--------------

**BLUE HILL  
5509**




**Danversbank**

One Conant Street Danvers, MA 01923  
BERNKOPF GOODMAN LLP

**CONFIDENTIAL**

111235302 Online Banking Transfer To CHECKING 27908692 At 04/05 1,003,839.25  
16:10

**BLUE HILL  
5510**

Member FDIC  
Member DIF 

[www.danversbank.com](http://www.danversbank.com)  
978.777.2200



**Danversbank**

One Conant Street Danvers, MA 01923

BERNKOPF GOODMAN LLP

**CONFIDENTIAL**

MONEYMARKET PERSONAL ACCOUNT

*Fineberg - 150 Royal*

DESCRIPTION

111235302 Online Banking Transfer  
35707901 At 16:10

INTEREST

DATE	AMOUNT
04/05	1,003,839.25
04/25	1,738.43

**BLUE HILL  
5511**

Member FDIC  
Member DIF 

[www.danversbank.com](http://www.danversbank.com)  
978.777.2200

Transaction Type	Date	Account No	Document No	Amount	Description	Balance
	02/07/2006					100.00

CONFIDENTIAL

# EXHIBIT D

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MASSACHUSETTS

BLUE HILLS OFFICE PARK LLC,  
Plaintiff/Defendant-in-Counterclaim

v.

Civil Action No. 05-CV-10506 (WGY)

J.P. MORGAN CHASE BANK, as  
Trustee for the Registered Holders of  
Credit Suisse First Boston Mortgage  
Securities Corp., Commercial Mortgage  
Pass-Through Certificates, Series 1999-C1,  
Defendant

and CSFB 1999 – C1 ROYALL STREET,  
LLC,  
Defendant/Plaintiff-in-Counterclaim

and

WILLIAM LANGELIER and GERALD  
FINEBERG,  
Defendants-in-Counterclaim

**GERALD FINEBERG'S SECOND SUPPLEMENTAL TO HIS ANSWERS  
TO DEFENDANTS' FIRST SET OF INTERROGATORIES**

Gerald Fineberg ("Fineberg") hereby supplements his answers to Interrogatories 2, 7 and 11 of the First Set of Interrogatories by the Defendants as follows:

**GENERAL OBJECTIONS**

Fineberg objects to each of Defendants' interrogatories to the extent that each interrogatory recites or incorporates a "definition" and/or an "instruction" which exceeds the scope of the Federal Rules of Civil Procedure. Fineberg also objects to each interrogatory to the extent that each interrogatory is vague, overly broad, unduly burdensome, seeks information that

dated as of August 5, 2003. Shortly thereafter, Joseph Donovan called Wells Fargo on the telephone regarding, *inter alia*, Equiserve's notification to Blue Hills that it would not be renewing its lease which would expire July 31, 2004. The date of this communication cannot be recalled by Mr. Donovan, although he recalls speaking with Wells Fargo representatives in 2003 regarding the replacement of Equiserve as a tenant at the Property. In addition and without limitation to the foregoing, and Fineberg's answers to Defendants' Second Set of Interrogatories, Fineberg states that documents adduced on discovery thus far have confirmed that the Defendants knew as early as the summer and fall of 2003 that Equiserve would not be renewing its lease and also confirmed that they received information to that effect from Blue Hills representatives.

**INTERROGATORY NO. 11**

State the amount of the Payment and describe the disposition of the Payment, and in your answer:

- a) identify each and every document which forms any part of the source of your information regarding the amount of the Payment or the disposition of the Payment;
- b) identify each and every person who received any portion of the Payment; and
- c) identify each and every bank account into which any portion of the Payment was deposited.



**ANSWER NO. 11**

**THE FOLLOWING ANSWER IS SUBJECT TO THE STIPULATION REGARDING THE PRESERVATION OF CONFIDENTIAL MATERIALS DATED DECEMBER 6, 2005.**

Fineberg objects to this interrogatory to the extent that it is overly broad, unduly burdensome, vague and ambiguous, seeks information that is subject to attorney-client privilege, and seeks information on the receipt, "disposition" of, and bank accounts related to the settlement amount that is privileged, irrelevant and not likely to lead to the discovery of admissible evidence. Fineberg further objects to this interrogatory to the extent its multiple subparts exceed the limit on interrogatories under the court order governing discovery. Without waiving these objections, and subject to the Confidentiality Stipulation, Fineberg states that the amount of the Payment was \$2,000,000, as set forth in the Settlement Agreement, which was produced on December 8, 2005 and stamped 1844 - 1855, and marked "Confidential." Fineberg further states that in accordance with the terms of the Settlement Agreement, the Payment was wired to Bernkopf Goodman LLP on or about August 8, 2003. Thereafter, one-half of the Payment was then deposited in a clients' fund account at Bernkopf Goodman LLP and one-half was deposited in a client funds' account at Wilmer Cutler Pickering Hale and Dorr LLP. Thereafter, the Payment has never been distributed out of such clients funds' accounts. Copies of the Bernkopf Goodman LLP and Wilmer Cutler Pickering Hale and Dorr, LLP clients' fund accounting ledger sheets and/or bank statements are attached hereto as documents bate-stamped Blue Hill 5507-5511. The intra bank transfer referred to in these documents between Century Bank and Danversbank was unrelated to the Payment.

# EXHIBIT E

CONTAINS INFORMATION SUBJECT TO PROTECTIVE ORDER  
Kenneth Goldberg, April 7, 2006

Exhibit: 340 Volume 1, Pages 1 - 210

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS  
Civil Action No. 05-CV-10506 (WJY)

-----  
BLUE HILLS OFFICE PARK LLC

Plaintiff, Defendant-in-Counterclaim

vs.

J.P. MORGAN CHASE BANK, et al.

Defendant

(Complete caption on next page.)

CONTAINS INFORMATION SUBJECT  
TO CONFIDENTIALITY STIPULATION  
DEPOSITION OF KENNETH GOLDBERG  
Friday, April 7, 2006, 9:42 a.m.

DLA Piper Rudnick Gray Cary US LLP  
33 Arch Street, 26th Floor  
Boston, Massachusetts

----- Reporter: David A. Arsenault, RPR -----

darsenault@fabreporters.com www.fabreporters.com

Farmer Arsenault Brock LLC  
50 Congress Street, Suite 415  
Boston, Massachusetts 02109  
617.728.4404 fax 617.728.4403

FARMER ARSENAULT BROCK LLC

f38a81f3-93bb-4e68-9b30-372388443761

1 Q. Was the Century Bank account into which the  
2 settlement payment was placed a client fund account?

3 A. Yes.

4 Q. For what client were those funds held?

5 A. In this case they were held for Blue Hills  
6 Office Park for the \$2 million that we are talking  
7 about which is the subject of the settlement which  
8 is Exhibit 21.

9 Q. Were the additional \$2.2 million in the  
10 supplemental account also held in a client fund  
11 account for the client Blue Hills Office Park LLC?

12 A. I don't know the answer to that. I would  
13 presume so. I do not have anything in front of me  
14 that shows that it was or was not. Looking at the  
15 tenor of the document, it would appear that it  
16 probably was.

17 Q. Similarly, was the initial account  
18 referenced in the agreement, Exhibit 176, held in a  
19 client funds account?

20 MR. McGLYNN: You're talking about the  
21 initial account, the so-called property account?

22 MR. FALBY: No, I'm talking about the  
23 initial account.

24 A. I want to make sure that we are using the

CONTAINS INFORMATION SUBJECT TO PROTECTIVE ORDER  
Kenneth Goldberg, April 7, 2006

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1 Our office keeps its records generally consistent  
2 with property addresses when we deal with real  
3 estate transactions. By the same taken, it says  
4 Fineberg. It certainly was not Fineberg's money.  
5 And, therefore, there's no intent here to  
6 specifically set out the legal entity who is the  
7 holder, nor is it here intended to say that they are  
8 Gerry Fineberg's money. Nor is it intended to say  
9 that Mr. Fineberg has the right to decide what to do  
10 with it. It is just simply the label that's put on  
11 it for the purpose of our internally knowing that in  
12 fact this related to 150 Royall Street. I can't  
13 attribute any more to it than that.

14 Likely the account was not in that name.  
15 It was in the Bernkopf Goodman name. We just called  
16 it Royall Associates for I think literally for 10 or  
17 15 years.

18 Q. So although it says Royall Associates, the  
19 money was actually received by Blue Hills Office  
20 Park LLC?

21 A. Yes. That's set out in writing in Exhibit  
22 21. It is very clear.

23 Q. And the money was then held in that account  
24 until the beneficiaries of Royall Associates Realty

CONTAINS INFORMATION SUBJECT TO PROTECTIVE ORDER  
Kenneth Goldberg, April 7, 2006

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1 this case. You do tend to ask long-winded questions  
2 that tend to be hard to understand. If you have a  
3 precise question that you want the answer to, let's  
4 ask it and move on to a different topic. I agree it  
5 has been asked and answered several times.

6 MR. FALBY: It was the answers that were  
7 long-winded, not my questions.

8 Q. Is the \$2.2 million that was held in the  
9 supplemental account -- strike that. Was the \$2.2  
10 million that was held in the supplemental account  
11 money that had already been distributed by the LLC  
12 to its member, the realty trust?

13 A. When?

14 Q. As of December 31, \$2004.

15 A. I don't know. Because I'm not -- I don't  
16 have the accounting records.

17 Q. But you do know, you say, that the \$2  
18 million settlement payment had not been distributed  
19 by the LLC to the realty trust?

20 A. I do know that and did say that because it  
21 had been in counsel's custody from inception and had  
22 not changed.

23 Q. Was the \$2 million payment recorded as a  
24 receipt by Blue Hills Office Park LLC in its books

1 Goodman?

2 A. I do not know the answer to who held the  
3 2.2. The only information I have in front of me  
4 relates to the \$2 million account.

5 Q. So you don't know whether the \$2 million  
6 account also contained the other 2.2 million that's  
7 defined as being included in the supplemental  
8 account or not, correct?

9 A. I believe that in fact this was a separate  
10 account. And there was one or more other accounts  
11 which totalled 2.2-million-plus dollars.

12 Q. And who were the client or clients for whom  
13 those accounts were held?

14 A. They were either the LLC, the trust or the  
15 beneficiaries. I can't answer that sitting here  
16 now. That's an accounting question. I only can  
17 answer here the \$2 million, because I had custody of  
18 that from inception. And here is the information  
19 documenting it, you have given me as Exhibit 177.  
20 Same question again.

21 Q. But this Exhibit 177, not to argue with  
22 you, doesn't tell you the client for whose benefit  
23 the \$2 million is held, does it?

24 MR. McGLYNN: Objection; asked and

1 answered.

2 A. To me it does. The answer is clear. If I  
3 go back to where it came from, it is very clear  
4 here. Pursuant to your Exhibit 21 settlement  
5 agreement, it was your LLC's money, the payment was  
6 made to the LLC, Paragraph 1, payment to BHOP. It  
7 is clear. That money got wired in, and it was never  
8 changed, into the same account; it's been in the  
9 same account from 8/8/03, when it was received. It  
10 stayed there for years until it was then transferred  
11 in 2/2/05 but retained, transferred into separate  
12 accounts, but there was no distribution or other  
13 change of ownership.

14 Q. Actually, it was first transferred into an  
15 IOLTA account, right?

16 A. Yes.

17 Q. And then transferred into a Century Bank  
18 account, correct?

19 A. Because we had to set up separate accounts.  
20 That's just a process question. The IOLTA account,  
21 we opened a separate account for this money  
22 separately, a separate account.

23 Q. And you are confident without checking the  
24 names of those accounts, based on the settlement



CONTAINS INFORMATION SUBJECT TO PROTECTIVE ORDER  
Kenneth Goldberg, April 7, 2006

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1 We ended up with it in a manner of how to implement  
2 the disposition of those funds. But from the time  
3 the money was generated it was out of Bernkopf  
4 Goodman's control.

5 Different: The \$2 million came pursuant  
6 to an agreement for the benefit of Blue Hills Office  
7 Park into in fact an account, defined account,  
8 separate account into our clients funds account and  
9 has continued to stay there. I have never received  
10 notice or direction that there's been a distribution  
11 or change of rights of ownership of that asset,  
12 period. That's the difference.

13 Q. And when did you get the 2.2 million of  
14 monies that were also in the supplemental account  
15 held by you as escrow agent?

16 A. Sometime prior to December 31st, 2004.

17 Q. You don't remember when or how or from  
18 whom?

19 A. Not with enough specificity. It came from  
20 the operating accounts. I don't know the answer to  
21 that.

22 Q. Do you have any written memorialization in  
23 any form of any of your conversations with Joe  
24 Warshaw, contemporaneous, I mean?